

ORIGINAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

FILED IN CLERK'S OFFICE
U.S.D.C. Rome
OCT - 6 2003

By: *J. H. Thomas* J. H. THOMAS, Clerk
J. H. Thomas Deputy Clerk

IN RE: TRI-STATE

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CREMATORIAL LITIGATION : MDL DOCKET NO. 1467

**FUNERAL HOME DEFENDANTS'
MOTION FOR PROTECTIVE ORDER
OF W. LEROY WILSON**

The Funeral Home Defendants in the above-styled action, pursuant to Fed. R. Civ. P. 26(c), file this their Motion for Protective Order as to Plaintiffs' Notice of Taking Videotaped Deposition of W. Leroy Wilson, respectfully showing the Court as follows:

1.

For the second time in this action, Plaintiffs have served a notice for the videotaped deposition of W. Leroy Wilson. (See Exhibit "A", attached hereto).

2.

Plaintiff's first deposed Mr. Wilson on October 3, 2002, in Rome, Georgia, from approximately 10:10 a.m. until 1:25 p.m. (See Exhibit "B," attached hereto).

3.

When Plaintiffs' counsel deposed Mr. Wilson on October 3, 2002, the discovery deposition was not limited in scope or subject area, and Plaintiffs were free to explore any and all areas of legitimate discovery at that time.

4.

Plaintiffs seek to re-depose Mr. Wilson only because his funeral home, W.L. Wilson and Son's, has filed a motion for summary judgment along with a supporting affidavit from Mr. Wilson. However, Plaintiffs have not filed a notice of objection or motion to strike the Wilson affidavit as is permitted under federal procedure.¹

5.

Plaintiffs should not be permitted to depose Mr. Wilson for a second time in these circumstances where there is no legitimate or legal basis for doing so, and to permit Plaintiffs to depose Mr. Wilson again will add unnecessary time and

¹ Several judges in the Northern District of Georgia have held that a notice of objection, not a motion to strike, is the proper method for challenging the admissibility of evidence in an affidavit. See, e.g., Morgan v. Sears, Roebuck and Co., 700 F. Supp. 1574, 1576 (N.D. Ga. 1988)(Forrester, J.); Pinkerton and Laws Co. v. Roadway Express, Inc., 650 F. Supp. 1138, 1141 (N.D. Ga. 1986)(Ward, J.); but see So. Concrete Co. v. United States Steel Corp., 394 F.Supp. 362, 380 (N.D.Ga.1975), aff'd, 535 F.2d 313 (5th Cir.1976).

expense to these proceedings and create a precedent that promotes inefficiency and unpreparedness.

WHEREFORE, for the above and foregoing reasons, Defendants respectfully pray that this Court grant the instant Motion for Protective Order of W. Leroy Wilson.

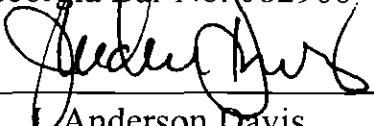
* * *

This is to certify that the foregoing pleading was prepared using Times New Roman 14 point font in accordance with LR 5.1(B).

Respectfully submitted this 6th day of October, 2003.

**BRINSON, ASKEW, BERRY, SEIGLER,
RICHARDSON & DAVIS, LLP**

Robert M. Brinson
Georgia Bar No. 082900

By: 
Leanne M. Davis
Georgia Bar No. 211077

P.O. Box 5513
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Phone: 706/291-8853
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Lead and Liaison Counsel for
Defendant Funeral Homes

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re: Tri State Crematory Litigation * MDL File Number: 1467

This applies to all actions *

NOTICE OF TAKING OF VIDEOTAPED DEPOSITION

TO: W. Leroy Wilson, By and through counsel of record, Stephen L. Cotter, and to other counsel through Lead/Liaison Counsel for the Funeral Home Defendants, J. Anderson Davis and Frank E. Jenkins, III, Lead/Liason Counsel for Marsh Defendants.

YOU ARE HEREBY NOTIFIED that, commencing on the tenth day of October, 2003, 2003, at 2:00 p.m., and continuing from day to day until complete, Plaintiffs will reconvene the video taped deposition, upon oral examination, pursuant to all applicable provisions of the Federal Rules of Civil Procedure, including, but not limited to F.R.Civ. P. 26 and 30, of W. Leroy Wilson for the limited purpose of inquiring into new matters contained within the affidavit submitted by the deponent in connection with the Motion for Summary Judgment filed by W.L. Wilson & Sons. Said deposition shall be taken before an officer duly

RECEIVED A

authorized by this court to take depositions and shall be utilized for all purposes allowable pursuant to the Federal Rules of Civil Procedure or other applicable law. The depositions will occur at the law offices of Brinson, Askew & Berry, in Rome, Georgia. You are invited to attend and to participate.

Dated this 30th day of September, 2003

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✓R/H/SH
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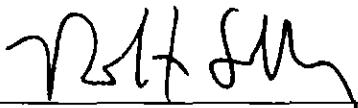
DAVID RANDOLPH SMITH &
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David Randolph Smith
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Joe Leman
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Dalton, Georgia 30720
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Facsimile: (706) 226-0040

Plaintiffs' Steering Committee

PROOF OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing was served by postage prepaid
United States mail on the 30 of September, 2003 addressed to those listed
below:



Robert H. Smalley III

J. Anderson Davis, Esq.
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Rome, GA 30162

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McCracken K. Poston, Jr., Esq.
Attorney at Law
62 Nance Lane
PO Box 1130
Ringgold, GA 30736

Counsel for Defendants T. Ray Brent Marsh & Tri-State Crematory

In The Matter Of:

TRI-STATE CREMATORIAL LITIGATION

W. LEROY WILSON

October 3, 2002

VIDEOTAPE

DEPOSITION

BROWN REPORTING, INC.

ATLANTA, AUGUSTA, MACON, ROME & SAVANNAH

1740 PEACHTREE STREET, N.W.

ATLANTA, GA USA 30309

(404) 876-8979 or (800) 637-0293

*Original File 1003WILS.ASC, 109 Pages
Min-U-Script® File ID: 0382705430*

Word Index included with this Min-U-Script®

EXHIBIT B

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[2]

[3]

[4]

[5] IN RE: TRI-STATE)
CREMATORIAL LITIGATION) MDL DOCKET NO. 1467

[6]

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[11] VIDEOTAPE DEPOSITION OF
W. LEROY WILSON

[12]

[13]

[14] October 3, 2002
10:10 a.m.

[15]

[16]

[17] The Forum
2 Government Plaza
Rome, Georgia

[18]

[19]

[20] Lisa A. Messina, CCR A-421

[21]

[22]

[23]

[24]

[25]

Page 1

Page 2

[1] APPEARANCES OF COUNSEL

[2]

[3] On behalf of the Plaintiffs:

[4] WILLIAM G. COLVIN, Esq.
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[5] Suite 500, First Tennessee Building
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[6] Chattanooga, Tennessee 37402-4800

[7] ALISTAIR E. NEWBERN, Esq.
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[10] J. ALLEN MURPHY, Jr., Esq.
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[12] Nashville, Tennessee 37212

[13] CHARLES BARRETT, Esq.
Barrett Law Office

[14] 3319 West End Avenue
Suite 600

[15] Nashville, Tennessee 37203

[16]

[17]

[18] Lead Counsel for Defendant Funeral Homes and
on behalf of SCI Defendants:

[19]

[20] J. ANDERSON ("ANDY") DAVIS, Esq.

[21] NATALIE WOODWARD, Esq.
Brinson, Askew, Berry, Seigler,

[22] Richardson & Davis, LLP
The Omberg House

[23] 615 West First Street

[24] Rome, Georgia 30161

[25]

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[1] cremations performed at your facility or a permanent
[2] written record?

[3] A: Yes, sir.

[4] Q: Independent from the individual client
[5] files?

[6] A: Yes, sir.

[7] Q: And have you done that as long as you've
[8] had your cremation facility?

[9] A: Yes, sir.

[10] Q: What type of information is kept in that
[11] log?

[12] A: Of course, you've got the written log with
[13] the date of death, the name and the case number.
[14] Then there is a file that has that person's name,
[15] date of death and case number on it. Inside that
[16] file is the copy of the cremation authorization, the
[17] permit and a copy of the death certificate.

[18] Q: Have you, Leroy Wilson, actually performed
[19] a cremation at your facility?

[20] A: Yes, sir.

[21] Q: On more than one occasion?

[22] A: Yes, sir.

[23] Q: Did you ever see a log similar to the one
[24] you have kept since 1996 at Tri-State?

[25] A: No, sir.

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[1] cremations for other funeral homes other than those
[2] that you own. Do you recall that?

[3] A: Yes, sir.

[4] Q: What do you charge other funeral homes for
[5] doing cremations for them?

[6] A: \$200.

[7] MR. DAVIS: Thank you. That's all I
[8] have.

[9] THE VIDEOGRAPHER: Off the record,
[10] please.

[11] (Deposition concluded at 1:25 p.m.)

[12] (Pursuant to Rule 30(e) of the

[13] Federal Rules of Civil Procedure and/or

[14] O.C.G.A. 9-11-30(e), the deponent and/or a
[15] party having requested the right to review
[16] the deposition, making corrections and/or
[17] changes and signing, for that purpose the
[18] errata pages have been annexed hereto.)

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Page 103

[1] Q: Where within your facility are the
[2] individual funeral director licenses displayed?

[3] A: On the hallway going from the lobby to the
[4] chapel.

[5] Q: And is that where they are — are they
[6] required to be displayed there publicly?

[7] A: Yes, sir, they're required to be
[8] displayed.

[9] Q: Did you ever see any kind of a license
[10] displayed at Tri-State?

[11] A: No, sir.

[12] MR. COLVIN: Mr. Wilson, I hope you
[13] get over your virus soon.

[14] THE WITNESS: Thank you. I hope so,
[15] too.

[16] MR. COTTER: Any other questions from
[17] Plaintiffs' counsel? Defense counsel?

[18] MR. DAVIS: I've got one.

[19] THE VIDEOGRAPHER: Off the record for
[20] a second.

[21] **CROSS-EXAMINATION**
[22] **BY MR. DAVIS:**

[23] Q: Mr. Wilson, my name is Andy Davis and I'm
[24] lead counsel for the defendant funeral homes.

[25] You were asked earlier about doing

[1] INDEX TO EXHIBITS

[2]

[3] Plaintiffs'

Exhibit	Description	Page
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[4]

[5] 1	Inspection report for W. L. Wilson & Sons Funeral Home	
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[6]	dated May 2001 and November 2001	38
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[7] 2	General price list of W. L. Wilson & Sons Funeral Home	64
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[12]	(Photocopies of Exhibits 1 and 2 have been attached to the original transcript, the originals	
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[13]	having been retained by Brown Reporting, Inc.)	
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

**IN RE: TRI-STATE
CREMATORIAL LITIGATION : MDL DOCKET NO. 1467**

**CERTIFICATION OF COUNSEL PURSUANT TO RULE 26(c)
IN SUPPORT OF DEFENDANTS' MOTION TO FOR PROTECTIVE
ORDER OF W. LEROY WILSON**

J. Anderson Davis, counsel for Defendants hereby certifies that he has conferred with Mr. Robert Smalley, counsel for Plaintiffs, in a good faith effort to resolve a dispute regarding its plans to file a Motion For Protective Order regarding the video-taped deposition notice of W. Leroy Wilson. The parties were not successful in resolving this dispute thus necessitating the filing of the above-referenced motion seeking this Court's protections.

* * *

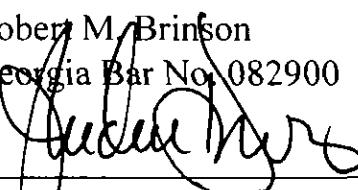
This is to certify that the foregoing pleading was prepared using Times New Roman 14 point font in accordance with LR 5.1(B).

Respectfully submitted this 6th day of October, 2003.

[Signature on Next Page]

**BRINSON, ASKEW, BERRY, SEIGLER,
RICHARDSON & DAVIS, LLP**

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Lead and Liaison Counsel for
Defendant Funeral Homes

CERTIFICATE OF SERVICE

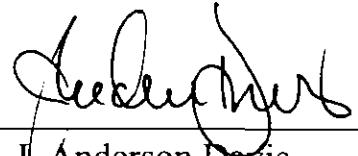
This is to certify that I have this day served counsel for all parties with a copy of the within and foregoing **Funeral Home Defendants' Motion for Protective Order, and Certificate of Counsel** by causing a copy of same to be placed in first class U.S. mail with adequate postage affixed thereto and addressed as follows:

Robert H. Smalley, III, Esquire
McCAMY, PHILLIPS, TUGGLE & FORDHAM, LLP
Post Office Box 1105
Dalton, GA 30720-1105
Liaison for Plaintiffs

McCracken Poston, Jr., Esquire
OFFICE of McCACKEN POSTON
Post Office Box 1130
Ringgold, GA 30736-1130
Lead Counsel for
Tri-State Crematory, Inc.

Frank E. Jenkins, III, Esquire
JENKINS & OLSON
15 Public Square, South
Cartersville, GA 30120-3350
Lead Counsel for
the Marsh Family

This 6th day of October, 2003.



J. Anderson Davis

ORIGINAL

FILED IN CLERK'S OFFICE
U.S.D.C. Rome
OCT - 6 2003

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

CLERK: *John C. Thomas*, Clerk
EY: *J.C. Thomas* Deputy Clerk

**IN RE: TRI-STATE :
CREMATORIAL LITIGATION : MDL DOCKET NO. 1467
:**

**FUNERAL HOME DEFENDANTS' BRIEF IN SUPPORT OF MOTION
FOR PROTECTIVE ORDER OF W. LEROY WILSON**

The Funeral Home Defendants in the above-styled action, pursuant to Fed. R. Civ. P. 26(c), file this their Motion for Protective Order as to Plaintiffs' Notice of Taking Videotaped Deposition of W. Leory Wilson, respectfully showing the Court as follows:

I. Introduction.

On September 30, 2003, Plaintiffs served Defendants with a second notice to take the video-taped deposition of W. Leroy Wilson. Plaintiffs first deposed Mr. Wilson, without limitation, on October 3, 2002, and the deposition was videotaped. Plaintiffs have no legitimate or legal basis for seeking to depose Mr. Wilson a second time, and only seek to re-depose Mr. Wilson because W.L. Wilson and Son's funeral home has a pending motion for summary judgment.

Plaintiffs cannot seek to re-depose every deponent who may submit a supplementary supporting affidavit¹ in support of a motion for summary judgment, and Plaintiffs cannot seek to re-depose every person whose deposition they forgot to make certain inquiries of or for which they simply did not adequately prepare. To permit Plaintiffs to do so would unnecessarily further escalate costs and expenses and would serve to only delay the proceedings.

This Court should grant the instant motion for protective order and thus protect Mr. Wilson from being subjected to a second video-taped deposition within the past twelve (12) months.

II. Argument and Citation of Authority.

Rule 26 and case law clearly indicate that a protective order may be sought in these circumstances. Courts have “broad discretion over the management of pre-trial activities, including discovery and scheduling.” Johnson v. Bd. of Regents of Univ. of Georgia, 263 F.3d 1234, 1269 (11th Cir.2001). Further, Courts may “make any order which justice requires to protect a party or person

¹ If Plaintiffs believe that the affidavit is either a sham or directly contradictory to Mr. Wilson’s prior deposition testimony, then it has an adequate remedy under the law. See Tippens v. Celotex Corp., 815 F.2d 66, 68 (11th Cir. 1987); Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987). The solution or remedy is not to permit Plaintiffs to re-depose each such deponent.

from annoyance, embarrassment, oppression, or undue burden or expense”

Fed.R.Civ.P. Rule 26(c). Rule 26 also provides that:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed.R.Civ.P. Rule 26(b)(2). And, Courts “retain[] the power to grant a protective order when the information sought in a deposition clearly would be irrelevant”.

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1420 (11th Cir. 1994) (citing Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir.1979)).

In this case, a protective order would promote the efficient “management of pre-trial activities”. This Court should not enable an inefficient and expensive practice of permitting Plaintiffs to re-depose deponents or parties which file motions for summary judgment. Plaintiffs already had this opportunity, and if Plaintiffs believe that the subject affidavit is, truly, a sham or inconsistent, then it may move to object and/or strike the affidavit as has been established under Eleventh Circuit authority.

The Wilson affidavit filed in support of W.L. Wilson and Son's motion

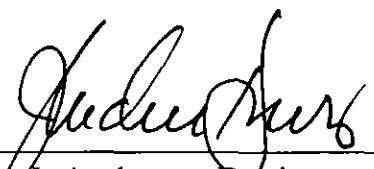
for summary judgment is neither inconsistent with, nor contradictory of, Mr. Wilson's prior sworn deposition testimony. But, if Plaintiffs disagree, then they had a remedy under to law by objecting to or moving to strike the affidavit. Plaintiffs have not done. Plaintiffs should not be permitted to simply re-depose Mr. Wilson on matters or issues it forgot to cover or failed to explore during the October 3, 2002, video-taped deposition.

Wherefore, for the above and foregoing reasons, Plaintiffs pray that this Court inquire into this Motion for Protective Order and grant same.

Respectfully submitted this 6th day of October, 2003.

**BRINSON, ASKEW, BERRY, SEIGLER,
RICHARDSON & DAVIS, LLP**

Robert M. Brinson
Georgia Bar No. 082900

By: 

J. Anderson Davis
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Lead and Liaison Counsel for
Defendant Funeral Homes

CERTIFICATE OF SERVICE

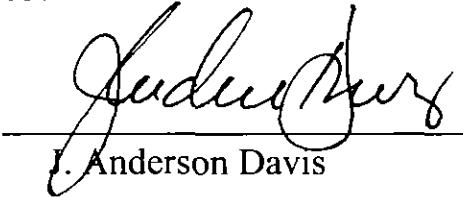
This is to certify that I have this day served counsel for all parties with a copy of the within and foregoing **Brief in Support of Funeral Home Defendants' Motion for Protective Order** by causing a copy of same to be placed in first class U.S. mail with adequate postage affixed thereto and addressed as follows:

Robert H. Smalley, III, Esquire
McCAMY, PHILLIPS, TUGGLE & FORDHAM, LLP
Post Office Box 1105
Dalton, GA 30720-1105
Liaison for Plaintiffs

McCracken Poston, Jr., Esquire
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Post Office Box 1130
Ringgold, GA 30736-1130
Lead Counsel for
Tri-State Crematory, Inc.

Frank E. Jenkins, III, Esquire
JENKINS & OLSON
15 Public Square, South
Cartersville, GA 30120-3350
Lead Counsel for
the Marsh Family

This 6th day of October, 2003.



J. Anderson Davis